



# Litigation Update

Litigation Section News

March 2006

## Litigation Section Events

### 2006 Annual Trial Symposium & Litigation Section Retreat

April 21–23, 2006

Silverado Country Club & Resort  
Napa Valley, CA

### A Week in Legal London

July 9–14, 2006

A Week in Legal London is an extraordinary opportunity to experience the inner workings of the English legal system, expand litigation skills and engage in thought provoking discussions with leading distinguished members of the London legal community. Attend sessions at the Royal Courts of Justice, the Old Bailey, Magistrates and Crown Courts. Meet and dine with leading judges, barristers and solicitors. Visit the four Inns of Court and historic sites in London.

### Oxford University Summer Program

Magdalen College, Oxford University  
July 16–20, 2006

In conjunction with A Week in Legal London, the Litigation Section's Oxford University Summer Program is an "inside the walls" experience at Magdalen College, Oxford University. This program is a combination of both law and history, fascinating to all participants, attorneys and non-attorneys alike. You can choose to attend either the London or Oxford program or both. By attending both programs you will satisfy all your MCLE requirements including the mandatory subjects.

For a more complete description of each program see our web site, or call the Litigation Section at (415) 538-2546.

[Click here: State Bar of California  
Week in the UK](#)

### Class action settlement may provide for donations to charities.

After the trial court approved a billion dollar settlement in consolidated class actions including a provision that a portion of the settlement funds would be devoted to charitable purposes, a member of the class objected, contending that *Code Civ. Proc.* §384, which only refers to amounts "payable to all class members" precluded the payment to charities. The Court of Appeal affirmed the trial court's overruling of the objection. The court held that under the doctrine of cy pres, such a distribution was authorized if some members of the class could not participate in the distribution of the settlement funds. *In re: Microsoft I-V Cases* (Cal. App. First Dist., Div. 1; January 9, 2006) [2006 DJDAR 331].

### Where a non-members of the tribe file claims in a tribal court, it gains jurisdiction over them.

Tribal courts lack jurisdiction over persons who are not members of the tribe. (See, *Montana v. United States* (1981) 450 U.S. 544, [101 S.Ct. 1245, 67 L.Ed.2d 493].) But where a non-member defended an action in a tribal court, without objection to the court's jurisdiction, and filed a cross-claim in that court, he waived the jurisdictional objection. *Smith v. Salish Kootenai College, et al* (9th Cir.; January 10, 2006) [2006 DJDAR 342].

### Where defendant fails to obtain a hearing within 30 days on an anti-SLAPP motion, it must show the court's docket required a later hearing.

The anti-SLAPP statute (*Civ. Proc.* §425.16) requires that the motion be noticed for hearing within 30 days and that the clerk must schedule the hearing within the same time period, "unless the condition of the court's docket required a later hearing." The burden is on the moving

party to establish the latter condition existed where the motion is heard beyond the 30-day period. *Barak v. The Quisenberry Law Firm* (Cal. App. Second Dist., Div. 4, January 10, 2006) [2006 DJDAR 392].

**Note:** When confronted with this situation, be sure to make a record of the reason for the delay in the trial court so that this becomes part of the record on appeal. We suggest that such a record may consist of a statement made in open court, if reflected in the reporter's transcript, an entry in a minute order, or a declaration, all showing that moving party made an effort to have the matter heard within 30 days and that the court's docket did not permit this.

### Ugly wireless antennas coming to your neighborhood.

In *Sprint PCS Assets v. City of La Canada Flintridge* (9th Cir.; January 17, 2006) [2006 DJDAR 637], the Ninth Circuit held that the Telecommunications Act of 1996 (to be found according to the court "in scattered sections of 15, 18, & 47 U.S.C."), limits the power of cities to withhold permits for the installation of wireless antennas. Specifically, a city may not deny such a permit based on aesthetic considerations. Thus, if you love artificial palm trees, sprouting old-fashioned

## Law Suits Fifth Annual Statewide Clothing Drive

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rooftop antennas, expect to see more of them. And those of you who lack the esthetic appreciation for such modern totems, you too may nevertheless expect to see more of them.

**The right to attorney's fees belongs to the client, not the lawyer.** The Ninth Circuit ruled that a lawyer does not have the right to seek attorney's fees after the client has waived them. Only after a prevailing party exercises his or her right to receive attorney's fees does the attorney's right to collect them vest. *Pony v. County of Los Angeles* (9th Cir.; January 11, 2006) [2006 DJDAR 400].

**Whether new SLAPP-back statute applies to pending cases is before the Supreme Court.** In our January issue we reported the enactment of *Code of Civil Procedure* § 425.18 placing limitations on so-called SLAPP-back motions. (i.e., an anti-SLAPP motion filed against a cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that was dismissed under the anti-SLAPP statute.) The issue whether the provisions of the newly enacted statute apply to pending cases is presently before the California Supreme Court in *Soukup v. Stock*, (Case No. S126864).

**Not all class action waivers are unenforceable.** In our September 2005 Litigation Update we

reported that in *Discover Bank v. Sup.Ct. (Boehr)* (2005) 36 Cal.4th 148, [30 Cal.Rptr.3d 76], our Supreme Court held a class-action waiver in an arbitration clause was unenforceable because the contract was procedurally and substantively unconscionable. But that decision was based on a finding that the contract containing the clause waiving the right to a class action was a consumer contract of adhesion. Where plaintiff was given 30 days to opt out of such a contract in an employment case, the Court of Appeal held that the contract was not one of adhesion and therefore the class-action waiver should be enforced. *Gentry v. Sup.Ct.* (Circuit City Stores, Inc. (Cal. App. Second Dist., Div. 5, January 19, 2006) [2006 DJDAR 737].

And, in another case, a credit card holder was given an option to decline an amendment to the credit agreement waiving class actions. If she exercised this option, her credit card would remain in effect until it expired and the existing payment terms would likewise stay in effect. Under these circumstances, the court held, with a dissenting opinion, that the amendment was not procedurally unconscionable and therefore could be enforced. *Jones v. Citigroup, Inc.* (Cal. App. Fourth Dist., Div. 3, January 26, 2006) [2006 DJDAR 1131].

**A defendant who succeeded in an anti-SLAPP motion**

**which disposed of only one out of many causes of action was not entitled to attorney fees.** The anti-SLAPP statute (*Civ. Proc.* §425.16) provides that a defendant who is successful in obtaining an order to strike under the statute is entitled to attorney fees. But where defendant was only successful in having a single cause of action, out of many, stricken, the Court of Appeal agreed with the trial court that an award of attorney fees was not required because defendant could not "in any realistic sense" be said to have prevailed. *Endres v. Moran* (Cal. App. Second Dist., Div. 5, January 19, 2006) [2006 DJDAR 739].

**Beware of "metadata" imbedded in your e-mail.** A recent ABA publication warns that deleted matter may be accessible to the recipients of e-mail. It defines "metadata" as "data embedded in an electronic document that is not readily visible or available to the reader." The publication warns that "using appropriate software, a recipient

### Rules & Legislation— Proposed Changes

A legislative proposal is under consideration to permit pre-dispute waivers of the right to jury trial. The proposals would allow contractual waivers of jury trials in nearly all business transactions. Please provide feedback by posting your comments on the Litigation Section discussion board using the links below (registration required to access proposal or discussion board links).

#### Registration Link

<http://members.calbar.ca.gov/discuss>

#### Proposal Link

<http://members.calbar.ca.gov/mb/showPost.aspx?PostID=296>

#### Discussion Board Link

<http://members.calbar.ca.gov/mb/showForum.aspx?ForumID=13>

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*California Court of Appeal  
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of the e-mailed document can recover this data, information the sending lawyers thought they had deleted.”

**Another win for the baby boomers.** A San Diego theater company producing a musical called “Boomers” offered reduced price tickets to members of the baby boom generation. Plaintiff was too young to qualify as a “baby boomer” and was denied the discount. She sued, claiming a violation of the Unruh Civil Rights Act (*Civ. Code* §51) and the unfair competition laws (*Bus. & Prof. Code* §§17200 ff.). The trial court sustained defendant’s demurrer without leave to amend. The Court of Appeal affirmed, holding that the age-based discrimination was reasonable under these facts. *Pizarro v. Lamb’s Players Theatre* (Cal. App. Fourth Dist., Div. 1; January 24, 2006) [2006 DJDAR 927].

**Don’t throw snowballs while snowboarding.** Under the doctrine of primary assumption of risk, participants in a sport do not owe a duty of care

to others engaged in the sport if the risk created is inherent to the sport. In *Mammoth Mountain Ski Area v. Graham* (Cal. App. Third Dist.; January 26, 2006) [2006 DJDAR 1085] the trial court applied the doctrine to grant summary judgment to a defendant who, while contemporaneously snowboarding and engaging in a snowball fight, slammed into plaintiff. The Court of Appeal reversed. The doctrine does not apply where the participant in the sport intentionally injures another or where the conduct is so reckless as to be totally outside the range of ordinary activity involved in the sport. Here there was a triable issue of fact whether the snowballing snowboarder acted recklessly.

**Payment imposed for employer’s failure to provide meal or rest periods is a penalty.** *Lab. Code* §226.7 prohibits employers from requiring employees to work during meal or rest periods. Where the employer fails to do so, it must pay an additional hour of pay for each such meal or rest period. Are these payments wages, subject to a four year statute of limitations, or penalties, subject to a one year statute of limitations? *Mills v. Sup.Ct. (Bed, Bath & Beyond, Inc.)* (Cal. App. Second Dist., Div. 5; January 27, 2006) [2006 DJDAR 1166], held that they are penalties and thus subject to the shorter statute of limitations.

**Defrocked lawyer is not a “layperson” authorized to represent clients in administrative proceedings.** Benninghoff resigned from the state bar with disciplinary charges pending. Thereafter he represented professional licensees in administrative hearings. The state bar, contending that he was engaged in the unauthorized practice of law, successfully petitioned the Orange County Superior Court to assume jurisdiction over his practice. Benninghoff sought writ review in the Court of Appeal, contending that lay persons may represent others in administrative proceedings. The Court of Appeal denied the writ. Without deciding whether or to what extent such representation by lay persons is permitted, the court concluded that Benninghoff did not qualify.

*Benninghoff v. Sup.Ct.* (The State Bar of California) (Cal. App. Fourth Dist., Div. 3; January 30, 2006) [2006 DJDAR 1218].

**Time limit for motion is measured from time of deposit.** A motion for summary judgment must be served at least 75 days before the scheduled hearing. (*Civ. Proc.* §437c (a)). When service is by overnight delivery carrier, the time must be extended by two days and, the statute provides that such service is complete at the time of deposit with the overnight service. (*Civ. Proc.* § 1013 (c)) Where the opposing party did not receive the motion papers deposited with an overnight service within 77 days before the motion (here delivery was delayed 19 days), the time requirements of § 437c (a) were nevertheless satisfied. *Barefield v. Washington Mutual Bank* (Cal. App. Third Dist.; February 1, 2006) [2006 DJDAR 1427].

## Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month’s issue of Litigation Update, please share them with other members on our website’s discussion board.

Our Board is quickly becoming “The Place” for litigators to air issues all of us are dealing with.

Go to:

<http://members.calbar.ca.gov/mb/ShowForum.aspx?ForumID=13> to explore the new bulletin board feature—just another benefit of Litigation Section membership.

**Remember to first fill out the Member Profile to get to the Discussion Board!**

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